MBF INSURANS SDN BHD

v.

PENANG GARDEN SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMED JCA
RAUS SHARIF J
[CIVIL APPEAL NO: P-02-164-96]
10 APRIL 2004

INSURANCE: *Contractor's All Risk - Indemnity - Damage to adjacent buildings resulting from piling work - Expenses incurred for remedial work, whether recoverable - Whether 'a safety measure which became necessary during construction' - Whether buildings must have collapsed - Strict and liberal interpretation of term 'collapse'*

WORDS & PHRASES: *"collapse" - Contractor's All Risk Policy - Whether can mean "settling, falling, cracking, bulging or breaking of the insured building or any part thereof in such manner as to materially impair the basic structure or substantial integrity of the building" - Whether must mean "falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support which means that the building must cave in or fall down"*

This was an appeal from the decision of the High Court declaring that the respondent/developer was entitled to be indemnified (against all expenditure, loss and damage incurred or sustained) under a Contractor's All Risk Policy ('the policy') issued by the appellant/insurers. The policy was taken to cover the respondent in respect of the construction work undertaken by the respondent's contractors for the second phase ('Phase II') of the Wisma Penang Garden Project ('WPGP'). As it had transpired, the piling work for Phase II caused the building structures in the adjacent first phase ('Phase I') to settle and tilt. The said piling work was thus suspended and the respondent had to carry out remedial work in respect thereof, as a result of which the respondent later made a claim for indemnity under the policy. The principal issue before the Justices of Appeal herein was whether the policy covered the respondent for the remedial work it carried out to safeguard the buildings in Phase I from 'further settlement and irreversible deterioration'.

Held (allowing the insurers' appeal)
Per Raus Sharif J delivering the judgment of the Court of Appeal:

[1] The policy must be read as a whole and general condition no. 5 must be read in the light of both general condition no. 3 and endorsement no. 105 thereof. Indeed, para 3 of endorsement no. 105 stated that, "Should further safety measures become necessary during construction, the expenses incurred for such measures are not indemnifiable under the policy". The remedial work carried out by the respondent on Phase I of WPGP were merely safety measures which became necessary during construction and, therefore, any expenses incurred in respect thereof were **not** recoverable under the policy. (pp 932 c-h, 933 a-g & 934 a)

[2] The appellant would only be liable to indemnify the respondent for loss or damage resulting from the said piling work if the structures in Phase I had collapsed, either wholly or partially. Here, the buildings in Phase I were still standing despite the serious cracks that occurred thereon. (p 934 b-c)

[2a] The word 'collapse' could **not** be defined liberally to mean, "The settling, falling, cracking, bulging or breaking of the insured building or any part thereof in such manner as to materially impair the basic structure or substantial integrity of the building". The strict, ordinary meaning of the word 'collapse' was preferred. There must be "falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support which means that the building must cave in or fall down." (pp 934 d-h & 935 a-b)

[Loss or damage sustained not recoverable under policy.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang mengisytiharkan bahawa responden/pemaju adalah berhak untuk digantirugi (terhadap semua perbelanjaan, kerugian dan kerosakan yang ditanggung atau dialami) di bawah satu Polisi Semua Risiko Kontraktor ('polisi') yang dikeluarkan oleh perayu/penanggung insurans. Polisi diambil bagi melindungi responden berkaitan dengan kerja-kerja pembinaan yang dilakukan oleh kontraktor responden untuk fasa kedua ('Fasa II) Projek Wisma Penang Garden ('PWPG'). Sebagaimana yang terjadi, kerja-kerja piling untuk Fasa II telah mengakibatkan struktur bangunan di fasa pertama bersebelahan ('Fasa I) memendap dan senget. Kerja-kerja piling dengan itu telah ditangguhkan dan responden terpaksa melakukan kerja-kerja pemulihan berakibat responden kemudian membuat tuntutan

indemniti di bawah polisi. Di hadapan yang arif Hakim-hakim Rayuan di sini, isu utama yang berbangkit adalah sama ada polisi merangkumi responden atas kerja-kerja pemulihan yang dibuat olehnya untuk melindungi bangunan-bangunan di Fasa I dari 'terus memendap dan rosak sehingga tidak boleh dipulihkan'.

Diputuskan (membenarkan rayuan penanggung insurans)
Oleh Raus Sharif H menyampaikan penghakiman Mahkamah Rayuan:

[1] Polisi hendaklah dibaca secara keseluruhan dan syarat am no. 5 hendaklah dibaca bersampingan dengan kedua-dua syarat no. 3 dan endorsmen no. 105 di situ. Malah, perenggan 3 endorsmen no. 105 menyatakan bahawa, "Sekiranya langkah-langkah keselamatan lanjut diperlukan semasa pembinaan, perbelanjaan yang dibuat bagi mengambil langkah-langkah tersebut tidak boleh digantirugi di bawah polisi". Kerja-kerja pemulihan yang dijalankan oleh responden di Fasa I PWPG hanyalah langkah-langkah keselamatan yang perlu diambil semasa pembinaan dan, kerana itu, sebarang perbelanjaan baginya tidak boleh dituntut di bawah polisi.

[2] Perayu akan hanya bertanggungan untuk menggantirugi responden atas kerugian atau kerosakan akibat dari kerja-kerja piling sekiranya struktur-struktur di Fasa I telah runtuh, sama ada keseluruhannya atau sebahagiannya. Di sini, bangunan-bangunan di Fasa I masih berdiri tegak walaupun berlaku keretakan-keretakan serius padanya.

[2a] Perkataan 'runtuh' tidak boleh ditafsirkan secara harafiah sebagai bermaksud, "pemendapan, penumbangan, keretakan, kelekukan atau kepecahan kepada bangunan yang diinsuranskan sehingga merosakkan struktur asas atau keutuhan bangunan". Yang diutamakan adalah maksud ketat, biasa 'runtuh'. Harus wujud "penumbangan atau pengecutan secara menyeluruh atau pemecahan melalui tekanan luaran atau kehilangan ketegaran atau sokongan yang bermakna bahawa bangunan harus roboh atau tumbang".

[Kerugian atau kerosakan yang ditanggung tidak boleh dituntut di bawah polisi.]

Case(s) referred to:

Anderson v. Indiana Lumbermen's Mutual Insurance Co of Indianapolis, Indiana, 127 Southern Reporter (2nd Series) 304 CA ***(not foll)***

Pans Food Importers & Distributors Pty Ltd v. Australia and New Zealand Banking Group Ltd [2000] 74 ALJR 79 HC ***(not foll)***

For the appellant - Rajashree Suppiah (Abdullah Abdul Rahman with him); M/s Cheang & Ariff

For the respondent - RJ Manecksha; M/s Ong & Manecksha

[Appeal from High Court, Pulau Pinang; Suit No: 23-91-87]

Reported by Gan Peng Chiang

JUDGMENT

Raus Sharif J:

This is an appeal against the decision of the High Court made on 26 February 1996. The High Court declared that, by a Contractor's All Risk Policy dated 10 August 1984, the respondent is entitled to be indemnified in respect of all expenditure, losses and damage incurred and sustained by it in consequence of carrying out remedial works to the site it was piling as well as to adjoining buildings.

The respondent was the developer of a project known as Wisma Penang Garden. The project was divided into two phases. Phase I was an eleven (11) storey building with a two storey annex. Phase II was a seventeen (17) storey building adjacent to phase I. Phase I was duly completed and occupied in 1983. The piling and foundation works for phase II started in October 1984.

By a Contractor's All Risk Policy dated 10 August 1984, the appellant insured the respondent and others, in respect of certain construction works to be carried out by respondent's contractor. The policy coverage includes loss or damage in relation to the construction of phase II, as well as for the third party liability in connection with the construction and erection of phase II. The policy further provided that in the event of any occurrence which might give rise to a claim under the policy, the respondent shall take all steps within its power to minimise the extent of the loss and damage. Further, by Endorsement 105 of the policy, the insurance was extended to cover loss or damage occurring in connection with the insured contractor's works to the structures in the vicinity of the site.

Upon the commencement of the piling operations on phase II, it was observed that the building structures on phase I were settling and tilting at a high rate. As a result, the piling works were suspended. Remedial works were immediately undertaken by the respondent.

Thus, the claim by the respondent in this case was in respect of all the expenditures, losses and damages incurred and sustained by it, due to the said remedial works. It was agreed by the parties that the amount claimed be limited to RM1,327,441.40 as the measure of damages.

The central issue in this appeal is whether or not the respondent is entitled to be indemnified in respect of all expenditures incurred and sustained by the respondent in carrying out the remedial works in order to save the buildings in phase I from "further settlement and irreversible deterioration".

The fourth paragraph of endorsement 105 of the policy expressly states as follows:

> In respect of loss or damage resulting from underpinning, tunneling or other operations involving supporting elements or the subsoil, the indemnity shall be restricted to **total or partial collapse**. (emphasis added).

There is no dispute that the piling works falls within the above clause. But what is in dispute is the definition of the word "collapse". It is the contention of the respondent that when remedial works were undertaken, actual collapse was under way. Therefore, the indemnity as appears in the fourth paragraph of endorsement 105 would have operated with the help of general condition 5 of the policy.

General condition 5 of the policy provides as follows:

> In the event of any occurrence which might give rise to a claim under this Policy, the Insured shall:
>
> (a) immediately notify the Insurer by telephone or telegram as well as in writing, giving an indication as to the nature and extent of loss or damage;
>
> (b) take all steps within his power to minimize the extent of the loss or damage.
>
> (c) …
>
> (d) …
>
> (e) …

> Upon notification being given to the Insurer under this condition, the Insured may carry out the repairs or replacement of any minor damage, in all other cases a representative of the Insurer shall have the opportunity of inspecting the loss or damage before any repair or alteration are effected. If a representative of the Insurer does not carry out the inspection within a period of time that could be considered adequate under the circumstances the Insured is entitled to proceed with the repairs or replacement. The liability of the Insurer under this Policy in respect of any item sustaining damage shall cease if the said item is not repaired properly without delay.

Thus, it is submitted for the respondent that the general condition 5 of the policy is to require the respondent to intervene in exactly the way it did in this case in order to minimise the extent of loss or damage. To the respondent, the imposition on the respondent of a duty, to act in this way to prevent the occurrence of further and more serious loss or damage, is balanced by an implied obligation on the part of the appellant to indemnify the respondent in respect of the cost of remedial measures.

With respect, we are unable to agree. We share the view of the appellant that the policy must be read as a whole. Therefore, general condition 5 must be read in the light of both endorsement 105 and general condition 3. The second paragraph of endorsement 105 expressly states as follows:

> Loss or damage to the above-mentioned structures is only covered if, prior to the commencement of the works, their condition is satisfactory and/or the necessary safety measures have been taken. The Insured shall produce together with the Insurer a report stating the condition of the structures before the beginning of the works.

The above paragraph did not indicate that the costs incurred in taking the necessary safety measures will be indemnified by the appellant. In fact the third paragraph of endorsement 105 expressly states that:

> Should further safety measures become necessary during construction, the expense incurred for such measure are not indemnifiable under the policy.

Thus, to us, the respondent's claim in respect of remedial works to save the structure of phase 1 are merely safety measures which became necessary during the construction, and, by virtue of the above clause, are not recoverable. Our view is further supported by general condition 3 which provides as follows:

> The Insured shall at his own expense take all reasonable precautions and comply with all reasonable recommendations of the Insurers to prevent loss, damage or liability and comply with statutory requirements and manufacturers' recommendations.

The above provision clearly states that reasonable precautions taken, to prevent loss or damage are at the respondent's expense.

Thus, taking the policy as whole, we are of the view that the appellant can only be liable for the loss or damage resulting from piling works if the building of phase I either collapsed wholly or partially. The word 'collapse' has been defined to mean 'to undergo or experience a falling-in, shrink suddenly together, break down, give way, cave-in' (See vol. I, p. 438 of the *New Shorter Oxford Dictionary*). In other words, the building in phase I must fall down either totally or partially, for the appellant to be liable. But in our case, it is undisputed that, although phase I building suffered serious cracks and settlement, it remained standing.

The learned counsel for the respondent has invited the court to adopt a more liberal interpretation of the word "collapse" in line with the American cases which have defined the word collapse to mean "The settling, falling, cracking, bulging or breaking of the insured building or any part thereof in such manner as to materially impair the basic structure or substantial integrity of the building". (See *Anderson v. Indiana Lumbermen's Mutual Insurance Co. of Indianapolis, Indiana*, 127 Southern Reporter (2nd Series) 304 CA). Thus, according to learned counsel for the respondent, to interpret the words "total or partial collapse" appearing in endorsement 105 to mean standing aside until the crashing down of glass and mortar to validify a claim would mean to give an interpretation which will produce an absurd result. We were urged to construe the policy document based on its practicality and not strictly, so as to give effect to the presumed commercial purpose. The case of *Pans Food Importers & distributors Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [2000] 74 ALJR 79 HC was cited as the authority to support the said proposition.

With respect, we are unable to agree. To us the word 'collapsed' has only one ordinary meaning ie, falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support which means that the building must cave in or fall down. Thus, when the words of the policy are crystal clear, those words must be given effect to. Moreover, as stated earlier the policy must be read as a whole. General condition 5 must be read in the light of both endorsement 105 and general condition 3. A

paragraph in endorsement 105 expressly states that safety measures are not indemnifiable under the policy. Further, general condition 3 expressly states that reasonable precautions to prevent loss or damage are at the respondent's expenses.

For the abovementioned reasons we are of the view that the costs incurred by the respondent for the necessary safety measures are not indemnifiable under the policy. Accordingly, the appeal is allowed with costs here and in the court below and that the deposit be refunded to the appellant.